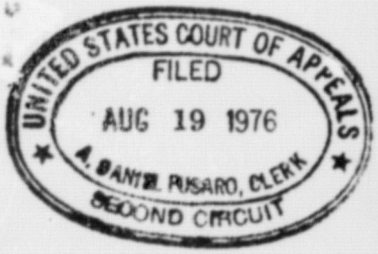
United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7696

To be argued by
JAMES P. DUFFY, III



In The

United States Court of Appeals

For The Second Circuit

KURT SCHMIEDER,

Plaintiff-Appellant,

vs.

LOUIS H. HALL, as executor of the estate of HELEN B. DWYER, deceased,

Defendant-Appellee.

On Appeal from the United States District Court, Southern District of New York.

BP/5

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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3

TABLE OF CONTENTS

Contents

TABLE OF CITATIONS

Cases Cited:

Contents

Contents

Other Authorities Cited:

IN THE
UNITED STATES COURT OF APPEALS

For the Second Circuit

- - - - - - - - - - - - - - - - - - - -x

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REPLY BRIEF FOR PLAINTIFF-APPELLANT

POINT I

THE LOWER COURT'S HOLDING THAT "PLAINTIFF FAILED TO SUSTAIN HIS BURDEN OF PROOF" IS NOT A FACTUAL FINDING (AS CLAIMED IN APPELLEE'S BRIEF P. 14).

The opinion below in action No. 1 (876 a sqq.) merely found that the evidence did "not establish that in 1938 Mrs. Dwyer and Louis H. Hall, Sr., embarked upon and consummated a conspiracy to defraud Schmieder." Otherwise it does nothing more than "observe that while generally either a constructive trust or fraud must be proved by clear and convincing evidence, we do not feel that plaintiff would have established his case

if normal civil standards of proof were to prevail" (890/1a).

Under appellant's opening brief, the facts clearly established by the opinion itself give rise to appellant's remedies for damages and constructive trust. Still, appellee (in his answering brief p. 14) contends that plaintiff has offered no argument why the so-called factual finding of no fraud should be overturned as "clearly erroneous."

Appellee's contention apparently is due to his concentration upon the (in Schmieder's view non-existing) issue as to whether or not the 1938 transfer from Schmieder to Dwyer was preceded by a gentlemen's agreement. Hall, Jr. grounded the alleged relevance of that issue upon the theory that, in the event of such "gentlemen's agreement", the transfer would have been less than absolute. The fallacy of his underlying proposition that an absolute gift and its subsequent undoing through the remedial operation of equity are "totally contradictory" (appellee's brief p. 17) is analyzed under Point III below. Schmieder agrees with Hall, Jr. on the absolute character of the 1938 transfer. The gentlemen's agreement has no contractual impact whatsoever and must simply be understood to have constituted assurances between the contracting parties about their mutual good faith and their resolution at all times to be bound by eternal principles of equity and decency -- an effect pre-

vided by the law of equity without regard to any gentlemen's agreement.

Schmieder mentioned the "so-to-speak gentlemen's agreement between the two men and myself" in his 1970 deposition (26a) in connection with his testimony that according to Hall Sr., the transfer "could only be done by way of a gift."[1] In Schmieder's view, this is a mere implementation of his pleadings that "he relied upon counsel's opinion that this transfer would be impregnable at law, leaving a mere moral obligation on the part of [Dwyer] to return the property to [Schmieder] after the emergency would have passed" (complaint in action No. 1, 8a) and that he, Schmieder, "considered it as axiomatic that Dwyer. . . could not in good conscience hold on to his life savings after the emergency had passed" (complaint in action No. 2, 1020a).

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1 While appellee and his various counsel have consistently attempted to supply a sinister motive on appellant's part as a result of his candor about a "gentlemen's agreement," the enormity of the circumstances were such that any one counselling the giving away of a substantial sum as the only alternative must have at the same time been most liberal in reminding appellant of the high character and integrity of the persons arranging and receiving the gift. Such statements would merely be reinforcements of the time honored principles that gentlemen deal fairly and openly with one another and in accordance with the highest standards of equity. Put another way, gentlemen do not take unfair advantage. This is the obvious aspect why Graupner talked to Schmieder "about Mr. Hall being connected with an old firm and so forth" (appellee's brief p. 8 near top; appellant's opening br ef p. 20 at top; E117) with the result that Schmieder "was satisfied to go ahead with the gift and I (Graupner) so reported to Mr. Hall."

Following appellee's theory, the opinion below in action No. 1 (876/7a), is erroneous in not perceiving that both sides considered the 1938 transfer to have been unconditional and absolute. The opinion characterizes Schmieder's position to the effect that he "claims that there was a gentlemen's agreement to return," and finds in accordance with Hall, Jr.'s position that, "there were no such gentlemen's agreement, and that the gift to Mrs. Dwyer was, in fact, unconditional and absolute."

The absolute nature of the transfer has been uncontested from the outset. The underlying dispute concerns the question of law whether this absoluteness destroys appellant's remedies. The alleged "factual finding" therefore, in Schmieder's view, is a "clearly erroneous" holding at law because his remedies are built upon facts which are either uncontested, or established by the court below.

POINT II

APPELLANT'S REMEDIES ARE NOT PREDICATED UPON PAROL.

The elimination of the gentlemen's agreement as a relevant part of appellant's case makes it clear that Schmieder does not seek a constructive trust which rests upon parol, but a constructive trust which follows by operation of law from the

facts found by the court. All cases cited or quoted on page 15 of the answering brief are therefore inapplicable. Moreover, Edmundson v. Friedell, 199 Ind. 582, 591 159 NE 428, 431 (1928), as partially quoted in Shapiro v. Rubens, 166 F2d 659, 666 (7th Civ. 1948) relies upon the authority of Crosby v. Henry, 75 Ark. 615, 88SW 949, 950 (1905), complete in 88 SW only, where a distinguishing decision is reached. The Supreme Court of Arkansas holds:

> ". . .constructive trusts sought to be proved by parol evidence cannot be established by slightly preponderating testimony, or anything short of evidence that is clear and satisfactory. Tillar v. Henry, (Ark.) 88 S.W. 573, and cases there cited. But in this case there is a very decided preponderance in favor of the appellee, and a refusal to accept his version of the facts and to grant the relief sought would be entirely arbitrary. Nor does this conclusion controvert the rule that an express parol trust is void under the statute of frauds. The trust here arises, not from the express agreement of Crosby to purchase the land for the benefit of Henry, but from the payment of the purchase price by Henry under the agreement that the purchase should be for him. The trust results under those circumstances by operation of law, and the fact that Crosby expressly agreed to hold the title in trust does not change its character as a resulting trust. Grayson v. Bowlin, 70 Ark. 145, 66 S.W. 658." (emphasis added)

Accordingly, there can be a simultaneous and independent

effect of parol as well as operation of law. Beyond that the Grayson case also makes clear that Schmieder's surplusage in claiming that there was some gentlemen's agreement would not weaken the automatic operation of the law flowing from the undue influence and windfall abuse worked upon him. Said the Supreme Court of Kansas (Grayson v. Bowlin 1902, 70 Ark. 145, 66 S.W. 659):

> "The trust would exist without the agreement by operation of law. The agreement cannot destroy the effect of the conditions under which the law presumes the estate is held by the trustee. Robinson v. Leflorl, 59 Miss. 148; Barrows v. Bohan, 41 Conn. 278; Cotton v. Wood, 25 Ia 43,"

It follows that, while the requirement of an increased preponderance would apply for parol alone, the shift of the burden by reason of operation of law remains in effect just as if there were no parol evidence.

In re Phillip's Estate, 12 Misc. 2d, 402, 176, N.Y.S. 2d 918 (New York County, Surrogate Cox, 1958) cited by appellee merely shows the remarkable shift of the burden of proving fraud committed by abuse of a confidential relationship. It cites Allen v. LaVaud, 213 NY 322, 325-326, 107 NE 570, 571 (1915) with regard to "certain classes of contracts" which make a prima facie case against the grantee "and cast upon the grantee the burden of showing that it (the contract) was the

product of a fair and honest transaction free from undue influence."

Another of appellee's cases, Appelbaum v. Appelbaum, 84 N.Y.S. 2d 505, 508 (1948) deals with fraud of a criminal nature only. The present case does not necessarily rely upon any criminal or dishonest intent of any person. Lyon v. Smith, 142 App. Div. 186, 126 N.Y.S. 994 (3d Dept. 1911), is entirely disconnected from the issues at bar. Lundy v. Murtash, 141 N.Y.S. 2d 247, 249, appeal dismissed, 143 N.Y.S.2d 820 (4th Dept. 1955), must be distinguished on the ground that there was no proof of the act which would constitute a breach of fiduciary duty. Merker v. Merker, 26 Misc. 2d 362, 204 N.Y.S. 2d 355 (1960), deals with a case without fiduciary relationship.

POINT III

DWYER'S ABSOLUTE TITLE AND SCHMIEDER'S CONSTRUCTIVE TRUST ARE COMPATIBLE.

Appellee asserts on page 17 of his answering brief:

> "To assert that although the gift was absolute the donee was under a moral obligation to return the property is totally contradictory and would mean that every gift, absolute when given, is subject to return upon the donor's demand."

This involves an entirely novel and unsupported theory to the effect that a moral obligation to return the gift property is inconsistent with an absolute character of the gift. There against Schmieder submits that the characterization of title is a matter of the law of property and that feature of moral impact which may impel a court of equity to grant remedial relief in aid of an action at law have no in rem effect (commonly being referred to as quasi in rem).

This legal origin of the constructive trust was analyzed by Roscoe Pound in his ground-breaking article "The Progress of the Law, 1918-1919, - Equity - 1. Nature of Equity Jurisdiction and of Equitable rights - 1. Equitable Remedies" in Harvard Law Review, Volume 33, pp. 420, 421 (cited in appellee's opening brief page 22 as basis for the treatment of the constructive trust in the leading cases of Melenky v. Melen, Cardozo, J., 1922, 233 NY 19 and Stoehr v. Miller, CCA 2d 1923, 296 F 414, 425, 426).

With reference to the remedial relief granted by "the Chancellor...in personam", Pound writes:

> ". . . one of the most effective remedial expedients at (the Chancellor's) command was to treat a defendant as if he were a trustee and put pressure upon his person to compel him to act accordingly. Thus constructive trust could be used in a variety of situations, sometimes to provide a remedy better suited to

> the circumstances of the particular case, where the suit was founded on another theory, as in cases of reformation, of specific performance, of fraudulent conveyance, and of what the civilian would call exclusion of unworthy heirs, and sometimes to develop a new field of equitable interposition, as in what we have come to think the typical case of constructive trust, namely, specific restitution of a received benefit in order to prevent unjust enrichment. In the latter case, constructive trust appears as what might be called a remedial doctrine, alongside of election, subrogation, contribution, and exoneration. In the cases first put, it is rather to be compared to negative decrees where historical prejudice or practical difficulties make courts hesitant to frame decrees affirmatively, to enforcement of incidental negative covenants in order to bring about performance of affirmative covenants which cannot be coerced directly because of practical obstacles, and to enforcement of arduous alternative duties at home in the expectation of coercing affirmative action abroad. <u>In neither case is there the substance of a trust.</u> This is not a matter of mere academic classification. Of the cases decided during the past year, two clearly recognize that a constructive trust is imposed simply as a remedy..."(footnotes omitted) (emphasis added)

Inasmuch as it can certainly not be maintained that the absolute character of a transfer of property is vitiated or in any way reduced by the incidence of a tort claim predicated upon the absolute transfer, it must be equally irrelevant under the law of property if a court of equity regulates the

relations between tortfeasor and his victim so as to create justice by imposing upon the tortfeasor the duties of a trustee.

POINT IV

THE TRANSFER WAS NOT A COMMON-LAW GIFT BECAUSE IT WAS NOT SUPPORTED BY DONATIVE INTENT.

One of the essential prerequisites for a common-law gift is the donor's intention to make a gift, his donative intent. See among numerous authorities, In Re Kelly's Estate, 1941, Lehman, Chief Judge, 285 NY 146, 155, 33 NE 2d 62: "To establish a valid gift inter vivos, there must have been an intention to give...", and Grey v. Grey, 1872, 47 NY 552, 555: "It has become a maxim in the law, that 'nemo donare facile presumitur'."

That all participants used the term "gift" in the transaction cannot be indicative of a donative intent on Schmieder's part. According to Black's Law Dictionary, revised 4th edition, 1968, p. 817, " (I)n popular language, a voluntary conveyance or assignment is called a 'deed of gift'." Moreover, Schmieder was clearly not mincing words and relied upon the definition supplied by his counsel. No clue as to Schmieder's intent can thus be derived from a merely conceptual interpretation.

Neither Dwyer nor Hall, Jr. has ever raised any allegation, substantiation, or faintest claim to the effect that Schmieder had a donative intent. Neither has there been any finding by

the ccurt below to that effect. On the other hand, the absence of donative intent has throughout this litigation been stressed by Schmieder, first in 1969, raising that point in his memorandum opposing Dwyer's motion to dismiss (627a --last two lines, 628a --first seven lines, 631a -- last line but two). Dwyer took the gift with at least an uncertainty as to donative intent, which neither Hall, Sr. nor William Graupner were able to clarify for her. After the blocking of German and Swiss property located in the United States, at Hall, Sr.'s suggestion that she seek the advice of independent counsel, she reported to the Federal authorities that she "was not in any relation to the donor which would permit (her) to be aware of the motive of the donor in making the gift" (E146).

Schmieder only recognizes a gift in the economic sense, and particularly for tax purposes, with all tax liabilities assumed by Dwyer (E13/14). In appellant's opening brief page 35, Schmieder fully sets forth the distinction between common-law gifts made with donative intent as compared with gifts in the economic sense (i.e., absolute transfers without donative intent but also without consideration in money's worth). The scope of Schmieder's interest in the transferred property was defined by Dwyer in her reply memorandum in support of her

motion to dismiss (637a) as follows:

> "Indeed plaintiff intended this to be an absolute gift and he sought the assurance that it would be impregnable at law because he was fearful of what the Nazis would do to him if they learned he had assets outside the country."

Even more explicit was Hall, Jr.'s moving memorandum in support of his first motion for summary judgment (664a to 665a):

> "It is vital to both parties that that gift be impregnable at law. Consideration had to be given not only to the German authorities but also to the Alien Property Office which of course might eventually seize enemy alien property as it had done in World War I. Under the law the only way to avoid seizure in this country was for the enemy alien to similarly sever all ties to the property by making an absolute gift. See for example, Miller v. Herzfeld, 4 F.2d 355 (3rd Cir. 1925). From Mrs. Dwyer's point of view the gift had to be absolute so she would not be charged with 'cloaking' the assets of an alien. Therefore, plaintiff's clear intent as well as Mrs. Dwyer's, was to arrive at a solution which would create an absolute gift."

The aforequoted Miller decision related to a gift tested with respect of a title claim for return of property vested as enemy property. In that case, three days after the 1917 severance of diplomatic relations between the United States and Germany, a German had given cable instructions for transfer of his New York account to his American brother. After

the war, the German brother testified that the transfer was intended as a gift (as was quite natural between brothers). The Court of Appeals for the Third Circuit held:

> "When there is doubt as to whether or not the transfer was intended as a gift, the subsequent declarations of the alleged donor may be sufficient proof to show the nature of the transaction Doty v. Wilson, 47 NY 580; Beaver v. Beaver et al., 1 7 NY 421, 428, 22 N.E. 940, 6 L.R.A. 403, 15 Am. St. Rep. 531; Van Cleef v. Maxfield, 196 App. Div. 734, 739, 188 NYS 322."

Accordingly, statements made by the donor after the war, or more aptly after the emergency, have probative value as to donative intent.

All statements subsequent to restraint by which Schmieder took a position as to whether or not his gift was supported by donative intent were clearly in the negative. Still, Hall, Jr. continued at all times in this case to talk about an "absolute gift" without approaching the issue of donative intent. He thus perpetuates the ambiguity of the statement placed before Schmieder in 1948 (E220) which omitted any attempt to clarify whether or not the transfer was supported by donative intent.

A probe into the issue of donative intent entirely ties in with the doings of the parties in the course of the attorney-client relationship, with all participants combining their

efforts to effect those prerequisities which enabled the others to adhere to the blueprint prescribed by Hall, Sr. It makes no difference whether Schmieder's cooperation in the engineering of the gift through his nominee Bochmann was the performance of some secondary obligation owed by him under the contract for le[illegible]l services or whether it merely was to perform a condition which "was the only basis upon which (Hall, Sr.) could act in the transaction" (at bottom of p. 652a, E195, answering brief p. 8, end of B). However this is looked at, there was a quid pro quo, constituting common-law consideration, expected by each side from the other in their mutual performance. The law firm of Hall, Sr. and Hall, Jr. was paid for its services prior and subsequent to the gift (E136/9, 285a/288a, E311/3). Although Stoneleigh was dissolved immediately after the transfer in 1938 (E310/1), the account was continued to be carried under "Stoneleigh" rather than in Schmieder's, Bochmann's, and/or Dwyer's name (E311/4, 285a-287a).[2]

Under Estate of Dunne, 1930, Wingate, Surrogate, Kings County, 136 Misc. 250, 251, unanimously affirmed without opinion, 1931, 2d Dept., 232 AD 831, "the intent of the alleged

2. Stoneleigh Corporation was organized in 1936 upon instructions from Schmieder (878a-879a).

donor is presumed to be the natural effect of (his) acts". Given the pressure of distress, Schmieder's and his nominee Bochmann's cooperation could only constitute such acts as a client naturally has to go through in order to get the benefit of (supposedly) needed legal assistance. The record does not contain any trace of evidence or hint that Schmieder's mind was beset with any thought about Dwyer's worthiness to receive a windfall. His gift therefore belongs into the group of cases where the transfer constitutes a taxable gift for the mere reason that no particular monetary value can be attributed to the common-law consideration received by the donor. Hall, Sr.'s advice was not a consideration constituting money or money's worth under the tax authorities set forth in appellant's opening brief p.35. In Wemyss, cited ibidem, the taxpayer had made a premarital agreement with his intended wife, whereunder he transferred property to her in consideration of her promise to marry him and in order to compensate her for a loss of income from trusts created by her former husband which she was not entitled to receive after re-marriage. The consideration was evaluated by the Supreme Court to be a common-law consideration only because, in order to be money's worth, it must benefit the transferor, and a mere detriment to the

transferee is not sufficient consideration. In spite of mutuality of promises and performances, and in spite of the clear absence of donative intent on the part of the husband, the transfer was subject to gift tax on the ground that the consideration was not in money or money's worth. Other cases based upon gifts in the economic and tax sense only are Merrill v. Fahs, decided by the Supreme Court through Justice Frankfurter together with Wemyss, 324 US 308, where the release of all the wife's dower and marital rights in the husband's property except the right to maintainance and support was held not to be adequate and full consideration under the gift tax statute, and Commissioner of Internal Revenue v. Bristol, 1941, CCA 1st, 121 F 2d, 129 to similar effect. Applying the rule of those cases to the case at bar, Schmieder made the transfer in the course of a transaction involving mutual duties and conditions of the parties and excluding donative intent. His gift was not a common-law gift.

In appellant's submission, the equitable adjudication herein can therefore not justly be made under appellee's viewpoint of a finality of gifts. The authorities cited by his answering brief, page 17, lower half, presuppose a common-law gift. Moreover, in the light of the supervening power of the conscience of equity, they are inapplicable anyhow.

POINT V

HALL, SR. HAD A PERSONAL BENEFIT IN THIS TRANSACTION.

Hall, Sr.abused his discretion in serving the interests of Schmieder, his client, when he conducted his search for a donee under the viewpoint that Schmieder's gift created a windfall and that it should fall to someone who deserved it by reason of prior misfortune (881a). Under the aspect of conflict of interest, that abuse gains in magnitude through the result that the investigation into adversities suffered by the candidate led to the selection of a person who "was very close to Mr. Hall's family" to such an extent that there was testimony by Mrs. Dwyer's friend Mrs. Nugent that she did not "think that anyone I knew of was as close to her as the entire Hall family" (answering brief page 13, 517a). The financial consequences following from such quasi family relationship were in a most unusual and truly enormous degree described by Dwyer's letter to Landa of October 28, 1948:

> "I would like to point out that I am and always have been deeply appreciative of all benefits I have derived from my association as Mr. Hall's secretary and have felt that with the exception of limited family responsibilities I wanted my property to go to certain descendants of his. And I certainly feel very keenly <u>since I received the gift</u> in question that I wanted most of my

> property to go to such descendants of Mr. Hall's." (answering brief p.13, E153) (emphasis added).

The coincidence of the results of the worthiness test with a protection of the financial interests of descendants of Hall, Sr. amounts to an exercise of his fiduciary discretion in a manner beneficial to himself. Due to his advanced age, his estate planning was clearly consistent with a switch of the fruits from the transaction to the next generation.

Concerning the shift of the burden of proving undue influence to Hall, Sr. by reason of his equitable disability as practicing attorney, appellee argues (answering affidavit, p.16) that, in accordance with cases dealing with undue influence invalidating wills, there should be merely an inference which the jury may be justified in drawing. Our research did not lead to any inter vivos case with the same result, and there is a good reason: in the will cases it is a foregone conclusion that there is a transfer mortis causa. The only open issue is the determination of the beneficiary. Inter vivos, however, there is also the further issue of whether or not any gift, and if so what type, is subject to undue influence. Thus, there is no basis to apply the relaxed rule, as invoked by appellee to inter vivos cases.

By reason of the principal involvement of Dwyer in the present transaction and her resulting equitable disability (appellant's opening brief, pages 14/7, 38, 1120a-1123a), the burden of proving that there was no undue influence, is borne by appellee, Hall, Jr.

The New York Court of Appeals, in Ford v. Harrington, 1857, 16 N.Y. 285, 289, held that the rule of equity throwing upon the attorney the burden of showing perfect fairness ". . . renders it almost impossible for (the attorney) to become the recipient of a gratuity or bounty from, his client." If the equitable disability presently shared by Hall, Sr. and Dwyer should not be recognized, Hall, Sr. would successfully have surmounted the consideration of the Court of Appeals that "it is difficult, and in most cases impossible, for the client to show that advantage has been taken of the relation."

POINT VI

SCHMIEDER'S 1948 STATEMENT IS FUNDAMENTALLY VAGUE BECAUSE THE IDENTITY OF THE DONOR IS IN DOUBT. IT ALSO IS IN ANY EVENT CONSISTENT WITH LACK OF DONATIVE INTENT AND WITH NON-EXCLUSION OF MORAL RESPONSIBILITY.

der's opening brief, p.37 attempts to penetrate into the mysteries enshrouding the authorship, genesis, and the putting into scene of what became Schmieder's 1948 statement (E220) which the court below termed "a crucial piece of evidence" (882a). Appellee's answering brief, p.10/11, on the other hand, does apparently not see anything which would require investigation, and introduces a mere quotation of the 1948 statement with the following words (incorrect anyhow inasmuch as the statement is in fact unsworn):

> "One of the items of evidence used to support Mrs. Dwyer's claim was the following sworn statement which plaintiff Schmieder had given to a friend of Graupner's in June, 1948."

The statement shows artistic draftsmanship so as to stay clear of all matters which could either have disturbed Hall, Sr.'s presentation of Bochmann as the donor or might have alerted Schmieder into non-cooperation. The latter risk would have been invited by language to the effect that Schmieder and

Bochmann were motivated by the intent to make a gift to Dwyer, or other words indicating donative intent on the part of a disclosed or undisclosed donor. Since this was a matter which Schmieder could not have truthfully confirmed and which he might also have found out of line with his moral expectations (201a), it was a professionally wise step of precaution for the author to abstain from going into the question of intent. Such strategy was justified by the subsequent preparedness of the Attorney General to accept that statement as crucial evidence without regard to the strong presumption of undue influence under the uncontested facts then on record (see opening brief, pages 21/3, 36/8, 1061a-1062a, 1120a-1123a).

Since the statement was transmitted for signature through Graupner's friend and since its phraselogy shows a uniquely nice balancing of prevalent requirements and risks, the only plausible author of the statement is Hall, Sr. It therefore must be presumed that Hall, Sr. drew the statement in a way which did justice to all legal requirements of the situation and at the same time avoided any prejudice to Schmieder, his client. Moreover, Schmieder was "locked up" by the East German communists shortly prior and subsequent to the signature date, June 1, 1948 (40a, 732a-746a). He was deeply depressed because "all the owners of businesses were constantly in the danger of being

imprisoned," and Graupner's messenger appeared like "a good angel" to him (208a). Considering further that Schmieder had to state what was "understood" by him, there is an extreme need to construe the statement in the widest sense in which it could possibly be understood by him.

Primarily, and regardless of immunities and privileges due to the aforelisted special circumstances, Schmieder rest. upon the objective ambiguity and incompleteness of the statement. The term "absolute gift" throws a number of things together, such as the nature of transfer ("absolute") and nature of the transaction ("gift"). The whole contrast area between a common-law gift and a gift in the economic sense is not touched upon, let alone the background relevant to the undue influence issue. Apart from the practically meaningless inquiry into the "voluntary" character of the gift (there was no compulsion, of course), no inquiry is made into any matters of intent or motivation. Ultimately such subjective matters are logically excluded from the inquiry as long as the identity of the donor is in doubt.

The conclusion, in Schmieder's submission, must be that his statement is truthful; the transfer is voluntary, absolute, and irrevocable; it constitutes a gift in the economic and tax sense, and there is no obligation of Dwyer. Any exclusions of

future operation of the conscience of equity (if binding stipulations in that regard were possible) are clearly outside the scope of the inquiry.

POINT VII

SCHMIEDER'S 1932 DIVISION OF HIS NEW YORK FUNDS IN TWO PARTS AND THE CONCEALMENT OF THE PART NOW IN ISSUE FROM GERMAN AUTHORITIES SERVED HIS RESISTANCE TO THE NAZI REGIME, WHICH CAME INTO POWER ON JANUARY 30, 1933.

Schmieder contests the validity of the judgment No. 1 for violation of due process, through uncertainty as to what was to be adjudicated, respective misunderstandings between court and counsel, erroneous assumptions without basis in the record as to Schmieder's credibility and his respectability as a patrotic fighter for the true Germany, unperverted by Nazism.

The division of Schmieder's proceeds stemming from the return of his family property vested in World War I into two separate parts (referred to by appellee in his answering brief pages 5/6) occurred in 1932. Schmieder testified in 1970 that "in 1932 we knew about what was going to happen in Germany" and that was the time when he had his discussions with Graupner about the division (56a, 57a). Since Graupner came to Germany

in summer only (55a), the discussions must have taken place in the summer of 1932. Meanwhile the following political events took place in Germany:

(1) the last democratic chancellor, Bruning, left office on May 29, 1932. From then on there was dictatorial government under emergency rules (962a).

(2) The last non-Hitler dictator, Schleicher, resigned on January 28, 1933, and Hitler came to power on January 30, 1933 (965a).

(3) The fatal agony of the Weimar Republic started in 1929 (958a-965a). The court below assumed that Hitler's rise to power occurred in 1934 only (878a) and placed the division of the funds into the early thirties generally, rather than into the critical period of the summer 1932 which preceded Hitler's rise to power by about 6 months only. Consequently there is no historical basis for the lower court's assumption (891a) that the concealment of the so-called hot money part, which is the fund presently in issue, could not have been motivated by Schmieder's hostility to the Nazis because the taxes evaded by him had been imposed by the German Government in the days of the Weimar Republic. As just shown the truly Republican days of Germany had already passed and the Nazis' ascent to power was generally foreseen. The sequence of events

must further be evaluated under the moral standards imposed upon the victims of the European dictatorships which led to a general ambition and need "to preserve their foreign assets at all costs, despite laws, decrees and regulations of all European governments to the contrary"; also to a widespread "disregard of grave penalties" (935a). The severe policies of the Nazis, eradicating Christianity and worshiping nazism as the highest ideal (977a) together with Schmieder's adherence to a quasi military group advancing patriotic and constitutional aims made it practically imperative for him to protect at least a part of his foreign assets from being used for the expected German war machine and from ultimate financial annihilation (59a).

After the nazification of the Stahlhelm in 1934 Schmieder joined the protesting underground opposition which became part of the revolutionary group under Goerdeler. The "second leader" of the Stahlhelm until 1934, Theodor Duesterberg, was scheduled to become the Minister of War under Goerdeler, and Schmieder kept contact with him. Schmieder suffered discrimination as to liberty and business by reason of his leaving the nazified Stahlhelm (91a-108a, 119a, 154a-159a, 223a-225a, 229a-234a, 983a).

POINT VIII

EVEN IF AN UNEXERCISED REMEDIAL RIGHT FOR CONSTRUCTIVE TRUST WAS VESTIBLE, DWYER AS A MERE DONEE COULD NOT BENEFIT THEREFROM.

As a matter of substantive law, Schmieder agrees that Dwyer acquired absolute title. Therefore, there was no substantive right of Schmieder's to be vested. Schmieder's later remedial rights (see Point III hereinabove) did not exist on the vesting date and depended upon subsequent events.

Apart therefrom, even if non-existing remedial rights, without basis under substantive law, could in violation of the exigencies of equity be vested, all the authorities relied upon by lower court and appellee would be distinguishable under appellant's opening brief, items 4, 5, 6, and 7 under Point I, also Point II.

Additional distinctions from the specific cases cited by appellee are these:

The Borax case (answering brief p.20) was a Sherman action by the federal government, where the issue was entirely different, namely whether pre-existing violations of anti-trust law could be subject to suit following vesting. There was no question of a title claim and partial return. Borax still concerned a disposition by the Attorney General as common-law

trustee, not a disposition by the United States after liquidation of the vested property. The Munich Insurance case arose under a specific Executive Order in 1918 giving the Alien Property Custodian authority to sell and dispose of property of insurance companies seized during World War I, and involved the sale of stock rather than return, where creditors sued. In the same category belongs Mutzenbacher. Junkers was a patent infringement action by the former owner of a vested patent, also is similar to a sales situation because the licensee serves the public interest by using the invention. In none of those cases was the government's transferee a mere donee.

It would be incongruous and a result never intended by Congress if Dwyer could have had better and greater rights in property after vesting and settlement than before the vesting. The Act was for the benefit of the public and not to permit Americans to take advantage of technical enemies. This would violate the Kawato rule (complaint in action No. 2, #27(b), 1026a).

The windfall issue has been raised in action No. 2 only. The first judgment can in no event be res judicata in that respect (1051a-1064a, 1112a-1117a). The cause of action for

windfall aims at protection of different interests, also affecting the public.

CONCLUSION

In the event of a denial of the constructive trust by reason of lack of standing, Schmieder prays for permission to pursue his remedy for damages at law.

Absent any vesting of plaintiff appellant's substantive rights for damages at law under items 1, 2 and 3 of point I his opening brief, Schmieder, in that event respectfully submits that his remedy at law then is adequate. He then prays for a judgment and summary judgment respectively, for damages.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

Re: 75-7696
Schmieder v. Dwyer

STATE OF NEW JERSEY :
: ss.:
COUNTY OF MIDDLESEX :

I, Muriel Mayer , being duly sworn according to law, and being over the age of 21 upon my oath depose and say that: I am retained by the attorney for the above named Plaintiff-Appellant .

That on the 18th day of August , 1976, I served the within Reply Brief in the matter of Kurt Schmieder v. Louis H. Hall as executor of the Estate of Helen B. Dwyer upon Martin, Obermaier, & Morvillo, Esqs., 1290 Ave. of Americas, New York, NY 10009 and Turchin & Topper, Esqs. 60 East 42nd Street, New York, NY 10007 by depositing two (2) true copies of the same securely enclosed in a post-paid wrapper, in an official depository maintained by the United States Government.

Muriel Mayer
Muriel Mayer

Sworn to and subscribed
before me this 18th day
of August 1976.

Lorraine Leotta
A Notary Public of the
State of New Jersey.

LORRAINE LEOTTA
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires April 13, 197